Supreme Court, U.S.
FILED

No. 98 977 DEC 14 1998

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

THE AMERICAN BIBLE SOCIETY, *et al.*,

Petitioners,

vs.

BOYD L. RICHIE, as Guardian
of the Estate of LOUISE T. PETER,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Russell Yager
Counsel of Record
Robert C. Walters
VINSON & ELKINS L.L.P.
3700 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 220-7820

December 14, 1998

QUESTION PRESENTED

In April 1997, the Fifth Circuit sanctioned Petitioners for appealing the district court's refusal to dismiss this action pursuant to the Charitable Gift Annuity Antitrust Relief Act of 1995, which Congress passed to bar Respondent's claim that Petitioners violated the Sherman Act by fixing rates of return for charitable gift annuities. In July 1997, Congress responded by passing the Charitable Donation Antitrust Immunity Act of 1997, which "replace[d]" the 1995 Act "with language drafted in broader terms, so as to ensure that the provision will be interpreted by the courts in a manner which will achieve the goals of the 1995 Act." H.R. Rep. No. 146, 105th Cong., 1st Sess., at 3 (1997). In December 1997, this Court vacated the Fifth Circuit's decision and remanded the case for reconsideration in light of the 1997 Act. *American Bible Society v. Richie*, 118 S. Ct. 596 (1997).

On remand, the Fifth Circuit reversed the order denying Petitioners' motion to dismiss but "reimpose[d]" sanctions, stating that it "d[id] not agree" that it was "obliged to 'decide according to existing law' the issue of the frivolousness of [this] appeal" and rejecting as "unpersuasive" Petitioners' contention that sanctions are improper in cases of first impression.

Against this background, Petitioners present a single question for review:

> Whether the Fifth Circuit abused its discretion under FED. R. APP. P. 38, which allows a court of appeals to impose sanctions when it "determines that an appeal is frivolous," by sanctioning the prevailing appellants in this meritorious and successful appeal presenting dispositive issues of first impression?

PARTIES TO THE PROCEEDING

Petitioners are The American Bible Society, The Moody Bible Institute of Chicago d/b/a Moody Bible Institute, American Leprosy Missions, Inc., The Lutheran Church-Missouri Synod, The Texas District, Lutheran Church-Missouri Synod, The Lutheran Foundation of Texas, Baptist Foundation of Texas, American Baptist Foundation, American Baptist Foreign Mission Society, The Evangelical Lutheran Church in America, General Conference Corporation of Seventh-Day Adventists d/b/a General Conference of Seventh-Day Adventists, Loma Linda University, University of Colorado Foundation, Inc., The American Council on Gift Annuities, Inc., Planned Giving Resources, Prerau & Teitell, Planned Giving Services, Inc., d/b/a Planned Giving Services, and Hay/Huggins Company, Inc., which were Defendants-Appellants in the Court of Appeals. Respondent Boyd L. Richie, as Guardian of the Estate of Louise T. Peter, was Plaintiff-Appellee in the Court of Appeals.

The other parties to the proceedings in the Court of Appeals were Defendants-Appellants United Church of Christ, Southern Baptist Convention, Good Shepherd Home Foundation, Mount Holyoke College, Smith College, Vassar College, St. Olaf College, Wittenberg University, Anderson University, Inc., d/b/a Anderson University, Northwestern University, The Salvation Army, a New York Corporation, The Salvation Army, a Georgia Corporation, The Salvation Army, a California Corporation, The Salvation Army, an Illinois Corporation, Gray, Plant, Mooty, Mooty & Bennett, and Appellant Dan Morales, as Attorney General of the State of Texas.

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners has any parent or subsidiary companies.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RULE INVOLVED 1

STATEMENT OF THE CASE 1

1. Charitable Gift Annuities 1

2. Proceedings and Disposition Below 3

REASONS TO GRANT THE WRIT 9

1. The Decision to Impose Sanctions in this Case of First Impression Conflicts with this Court's Decision in *McKnight v. General Motors* and with Twenty Years of Circuit Court Precedent. 10

   A. For Twenty Years, the Courts of Appeals Have Barred Sanctions in Cases of First Impression. 11

   B. In *McKnight*, this Court Raised the Bar Against Sanctions in Cases of First Impression. 12

   C. The Fifth Circuit's Departure from Binding Precedent Merits Review. 13

2. The Decision to Judge the Alleged Frivolity of this ~~Appeal by~~ Reference to the 1995 Act Conflicts with this Court's Decisions in *United States v. Schooner Peggy* and *American Bible Society v. Richie.* 14

3. The Determination that this Appeal Was Frivolous When Filed Is an Abuse of Discretion Justifying an Exercise of this Court's Supervisory Power. 16

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases

Adult Film Association v. Thetford, 776 F.2d 113 (5th Cir. 1985) 12

American Bible Society v. Richie, 118 S. Ct. 596 (1997) ..... *passim*

Asai v. Castillo, 593 F.2d 1222 (D.C. Cir. 1978) 11

Barney v. Holzer Clinic, Ltd., 110 F.3d 1207 (6th Cir. 1997) 13

Coghlan v. Starkey, 852 F.2d 806 (5th Cir. 1988) 12

Cullen v. Paine, Webber, Jackson & Curtis, Inc., 863 F.2d 851 (11th Cir.), *cert. denied*, 490 U.S. 1107 (1989) 11

Earles v. State Board of Certified Public Accountants of Louisiana, 139 F.3d 1033 (5th Cir.), *cert. denied*, 119 S. Ct. 444 (1998) 10

Ehm v. Amtrak Bd. of Directors, 780 F.2d 516 (5th Cir. 1986) 12

Estiverne v. Sak's Fifth Avenue, 9 F.3d 1171 (5th Cir. 1993) 12

Hageman v. City Investing Co., 851 F.2d 69 (2d Cir. 1988) 11

Hopwood v. Texas, 84 F.3d 720 (5th Cir. 1996) 14

Kale v. Combined Insurance Company of America, 861 F.2d 746 (1st Cir. 1988) 11

McKnight v. General Motors Corp., 511 U.S. 659 (1994) ..... *passim*

Overnite Transportation Company v. Chicago Industrial Tire Company, 697 F.2d 789 (7th Cir. 1983) 11,13

Ozee v. American Council on Gift Annuities, 110 F.3d 1082 (5th Cir.), *vacated sub nom.*, *American Bible Society v. Richie*, 118 S. Ct. 596 (1997) 1,6-7

Ozee v. American Council on Gift Annuities, 143 F.3d 937 (5th Cir. 1998) ..... *passim*

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) .. 15

Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 10
Richie v. American Council on Gift Annuities, 943 F. Supp. 685 (N.D. Tex. 1996), *rev'd sub nom., Ozee v. American Council on Gift Annuities*, 143 F.3d 937 (5th Cir. 1998) 1,4-5
Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) . 14
Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 14
Stebco Inc. v. United States, 916 F.2d 556 (9th Cir. 1990) 11
United States v. Alexander, 981 F.2d 250 (5th Cir. 1993) 14
United States v. Schooner Peggy, 1 Cranch 103, 2 L. Ed. 49 (1801) . . . . . *passim*

Statutes

Charitable Donation Antitrust Immunity Act of 1997, Pub. L. No. 105-26, 111 Stat. 241 (1997) . . . . . *passim*
Charitable Gift Annuity Antitrust Relief Act of 1995, Pub. L. No. 104-63, 109 Stat. 687 (1995) . . . . . *passim*
15 U.S.C. § 1 3,4
15 U.S.C. § 15 3
15 U.S.C. § 26 3
26 U.S.C. § 501 3,4,5,6
28 U.S.C. § 1254 1
28 U.S.C. § 1331 3
28 U.S.C. § 1337 3

Rule

Fed. R. App. P. 38 . . . . . *passim*

Miscellaneous

H.R. Rep. No. 336, 104th Cong., 1st Sess. (1995) . *passim*
H.R. Rep. No. 146, 105th Cong., 1st Sess. (1997) . . i,8,17

Petitioners respectfully request a writ of certiorari to review the June 12, 1998, order of the United States Court of Appeals for the Fifth Circuit sanctioning Petitioners under FED. R. APP. P. 38.

OPINIONS BELOW

The opinion of the Court of Appeals, PA 1-8, is reported at 143 F.3d 937. The prior opinion of the Court of Appeals, PA 9-29, is reported at 110 F.3d 1082. The opinion of the district court, PA 30-42, is reported at 943 F. Supp. 685.

JURISDICTION

The Fifth Circuit entered judgment on June 12, 1998, and denied rehearing on September 15, 1998. PA 43-45, 46-47. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

This case involves the application of FED. R. APP. P. 38, which provides that, "[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."

STATEMENT OF THE CASE

This case arises from Respondent's claim that charities violated the Sherman Act by conspiring to fix rates of return for charitable gift annuities. Although the Fifth Circuit rendered judgment dismissing that claim with prejudice, a live controversy remains concerning the Fifth Circuit's order sanctioning Petitioners $15,000.00 for bringing this meritorious and successful appeal.

1. Charitable Gift Annuities.

The House Report on the Charitable Gift Annuity Antitrust Relief Act of 1995, Pub.L. No. 104-63, 109 Stat. 687 (1995), succinctly describes charitable gift annuities and

the role of the American Council on Gift Annuities, Inc., [hereinafter, "the Council"] in developing annuity rates:

> A charitable gift annuity is a fundraising instrument defined and regulated under section 501(m)(5) of the Internal Revenue Code. A person who enters into a gift annuity agreement with a religious, charitable or educational institution makes a gift to the institution and receives a fixed income for life. Since the value of the gift received is more than the property transferred to the donor, a bargain sale has occurred, and the difference in values is deductible to the donor. 26 U.S.C. § 1011(b).
>
> The annuity rate applied to the value of the gift is the critical element in ensuring that the transaction will result in a meaningful gift to the charity. The American Council on Gift Annuities, a non-profit organization representing more than 1,500 charitable organizations and institutions, provides technical assistance to its members in determining appropriate annuity rates. The rates recommended by the Council are based on actuarial studies of mortality experience among annuitants and a conservative projection of the rate of income to be earned on invested reserve funds. They are computed to produce an average "residuum" or gift to the organization of between 40 and 60 percent of the amount originally donated under the agreement. Consequently, the rates are lower than and are not in competition with any rates offered commercially.

H.R. Rep. No. 336, 104th Cong., 1st Sess. at 2 (1995). The Council promotes the use of its rates because "it protects the fiscal integrity of the charity" and "ensures that donative intent rather than financial gain motivates the choice of recipient." *Ibid.* To accomplish their work, the Council and its sponsor charities rely on the assistance of attorneys, accountants, actuaries, and consultants.

2. Proceedings and Disposition Below.

In December 1994, Dorothy Ozee, the predecessor in interest to Respondent Boyd L. Richie, filed this class action in the United States District Court for the Northern District of Texas, invoking jurisdiction under 15 U.S.C. §§ 15 and 28 U.S.C. §§ 1331 & 1337 and seeking treble damages under Sections 4 and 16 of the Clayton Act, 15 U.S.C. § 15 & 26. Ozee, then Richie, claimed that the Council's practice of recommending uniform rates of return for charitable gift annuities issued by charities under 26 U.S.C. § 501(m)(5) was an agreement to fix prices in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

In November 1995, Congress reacted to Richie's claim by passing the Charitable Gift Annuity Antitrust Relief Act of 1995 [hereinafter, "the 1995 Act"], which provided that "it shall not be unlawful under any of the antitrust laws . . . for 2 or more persons described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) that are exempt from taxation under section 501(a) of such Code to use, or to agree to use, the same annuity rate for the purpose of issuing 1 or more charitable gift annuities." Pub. L. No. 104-63, § 2, 109 Stat. 687, 687 (1995). According to the House Report, the 1995 Act provided a "complete defense" to Richie's price-fixing claim by protecting not only the conduct of charities in using agreed rates in issuing charitable gift annuities, but also the Council's conduct in "publi[shing] . . . actuarial tables or annuity rates for use in issuing gift annuities" and the conduct of "attorneys, accountants, actuaries, consultants, and others . . . when assisting in the issuance of a charitable gift annuity or the setting of charitable annuity rates." H.R. Rep. No. 336 at 4, 6.

In December 1995, Petitioners filed a motion to dismiss Richie's antitrust claim pursuant to the new statute.

Richie responded by moving for leave to file a new complaint alleging that the Council and some of its sponsors had fraudulently obtained their tax-exempt statuses and thus were not "described in section 501(c)(3)" and "exempt from taxation under section 501(a)" within the meaning of

the 1995 Act. In support of his motion, Richie argued that the 1995 Act protected only rate-setting pacts among "bona fide" 501(c)(3) organizations and did not protect agreements involving both "exempt" and "non-exempt" entities.

In reply, Petitioners argued that Richie's effort to evade dismissal was futile. In the 1995 Act, as elsewhere, they argued, Congress used the phrase "described in section 501(c)(3)" and "exempt from taxation under section 501(a)" as a shorthand reference to tax-exempt organizations recognized as such by the IRS and not as a factual element to be proven in court.[1] In addition, they showed that Congress clearly intended the 1995 Act "to extend to" non-501(c)(3) entities such as "attorneys, accountants, actuaries, consultants, and others . . . when assisting in the issuance of a charitable gift annuity or the setting of charitable annuity rates." H.R. Rep. No. 336 at 6. Finally, they explained that reading the 1995 Act to differentiate between rate-setting agreements involving only "exempt" entities and rate-setting agreements including "non-exempt" entities would advance neither tax policy nor antitrust policy.

In September 1996, the court granted Richie leave to file his new complaint and denied Petitioners' motion to dismiss. PA 30-42. Rejecting Petitioners' contentions, the court held that the 1995 Act protected only those proven in court to be "described in section 501(c)(3)" and "exempt from taxation under section 501(a)" and that any defendant proven to be so described and so exempt would nevertheless lose the protection of the 1995 Act if it participated in a rate-setting agreement with a "non-exempt" entity. *Id.* at 34-37. Reading the 1995 Act to grant an affirmative defense to particular parties rather than to limit the substantive reach of the Sherman Act, the court held that each defendant seeking the Act's protection had to plead and prove (i) that

---

[1]Petitioners cited twenty-two federal statutes (other than tax statutes) and thirty federal regulations (other than tax regulations) that refer to charities as organizations that are "described in section 501(c)(3)" and "exempt from taxation under section 501(a)."

it was "described in section 501(c)(3)" and "exempt from taxation under section 501(a)" and (ii) that every entity with which it allegedly conspired was so described and so exempt. *Id.* at 37-38. Apparently overlooking Richie's longstanding allegation that non-501(c)(3) attorneys and actuaries had participated in the alleged conspiracy, however, the court surmised that each charity's exemption under the 1995 Act would likely turn on the legitimacy of the Council's tax-exempt status and ordered the parties to begin discovery regarding that issue. *Id.*

In October 1996, Petitioners appealed the order denying their motion to dismiss. Noting that, under the district court's interpretation of the 1995 Act, the participation of non-501(c)(3) attorneys and actuaries in the alleged rate-setting conspiracy would bar dismissal of Richie's claim regardless of the Council's tax-exempt status, Petitioners argued under the *Cohen* doctrine that the district court's order conclusively determined their claimed right to an immunity from suit under the antitrust laws and was effectively unreviewable on appeal from a final judgment. In the alternative, Petitioners sought a writ of mandamus, arguing that, absent immediate review under the *Cohen* doctrine, the denial of their motion to dismiss would be an abuse of discretion for which there would be no adequate remedy by appeal.

On the merits, Petitioners renewed their argument that reading the 1995 Act to differentiate between rate-setting agreements involving only "exempt" entities and rate-setting agreements including "non-exempt" entities would advance neither tax policy nor antitrust policy. *See id.* at 48-66. They explained that the 1995 Act immunized the alleged conspiracy among "exempt" and "non-exempt" entities by immunizing the only aspect of the purported conspiracy that could have produced price-fixing liability in the absence of the Act: the agreement of two or more charities to use the same rates for issuing gift annuities. *See id.* They also challenged the district court's conclusion that charities bore the burden to plead and prove the application of the 1995

Act as an affirmative defense, arguing that Richie bore a burden to plead and prove an antitrust violation falling outside the scope of the 1995 Act. *See id.* at 57-58 n.4.

The House and Senate sponsors of the 1995 Act soon joined Petitioners in urging reversal. *See* PA 67-69. As *amici curiae*, United States Representative Henry J. Hyde, United States Senator Christopher J. Dodd, and ten other members of Congress filed a brief confirming Congress' intent to protect so-called "hybrid" conspiracies by "clearly provid[ing]" in the 1995 Act "that the antitrust laws do not apply to ***any*** 'use' by charities of the . . . [Council's] . . . suggested rates." *See id.* at 68 (emphasis added). Two weeks later, the District Judge sent a letter to the Fifth Circuit conceding that he might have erred in holding that bona fide charities would lose the Act's protection by joining rate-setting agreements involving "non-exempt" entities:

> I wrote that there [was] an issue of whether an exempt entity conspiring with a nonexempt entity would . . . vitiate the exemption. . . . [A]t first blush [Richie's] position seemed correct. After reading more cases and further consideration of the arguments I would now say I am not so sure of [Richie's] position. (If . . . relief . . . is denied I would welcome an advisory opinion.)

Id. at 75. The court apparently realized that reading the 1995 Act to protect only "exempt" entities contravened Congress' clearly expressed intent that the Act "extend to" the "attorneys, accountants, actuaries, consultants, and others" that Richie had added as defendants in August 1995, four months before Congress passed the 1995 Act. *See* H.R. Rep. No. 336 at 6.

In April 1997, the Fifth Circuit dismissed Petitioners' appeal for lack of jurisdiction. Holding that Petitioners could not "reap [the] benefits" of the 1995 Act because it "cover[ed] only agreements between '2 or more persons described in section 501(c)(3) of Title 26 that are exempt from taxation under section 501(a) of Title 26'" and, thus, "d[id] not reach conspiracies involving both exempt and non-

exempt entities," PA 17, the court concluded that the order denying Petitioners' motion to dismiss did not finally resolve a legal question separate from the merits of Richie's antitrust claim, *id.* at 18. The court further held that mandamus was unwarranted because Petitioners had shown no clear and indisputable right to dismissal. *Id.* at 20-21.

The court also sanctioned Petitioners $15,000.00 for prosecuting a frivolous appeal. *Id.* at 27-29. Without addressing (a) the Petitioners' argument that the 1995 Act protected the alleged "hybrid" conspiracy by immunizing its only putatively anticompetitive aspect: the agreement of two or more charities to use the same annuity rates, (b) the House Report's statement that Congress intended the 1995 Act "to extend to attorneys, accountants, actuaries, consultants, and others," (c) the congressional *amici's* reminder that Congress intended the 1995 Act to protect "any" use of Council rates by charities, or (d) the District Judge's concession that he might have erred with respect to "hybrid" conspiracies, the court held that sanctions were warranted because the court's interpretation of the 1995 Act was "obvious" and "not arguable." *Ibid.*

In July 1997, Congress responded with the Charitable Donation Antitrust Immunity Act of 1997 [hereinafter, "the 1997 Act"], which amended the 1995 Act to provide that "the antitrust laws . . . shall not apply to charitable gift annuities" and that "any person subjected to any legal proceeding . . . under the antitrust laws . . . on account of setting or agreeing to rates of return or other terms for, negotiating, issuing, participating in, implementing, or otherwise being involved in the planning, issuance, or payment of charitable gift annuities . . . shall have immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial, for [such] conduct." Pub. L. No. 105-26, 111 Stat. 241 (1997). Section 3 of the 1997 Act directed that the "Act, and the amendments made by th[e] Act, shall apply with respect to all conduct occurring before, on, or after the date of the enactment of th[e] Act and shall apply in all . . . judicial

actions pending on or commenced after th[at] date . . . ." *Id.* The House Report on the 1997 Act stated that Congress retroactively amended the 1995 Act in this fashion because the district court's order and the Fifth Circuit's decision "indicate[d] that the Charitable Gift Annuity Antitrust Relief Act of 1995 [wa]s not being interpreted as broadly as it was intended by Congress." H.R. Rep. No. 146, 105th Cong., 1st Sess. at 3 (1997).

In August 1997, Petitioners sought certiorari, arguing that Congress' enactment of the 1997 Act and the Fifth Circuit's abuse of its discretion under FED. R. APP. P. 38 justified review. In December 1997, the Court granted the writ, vacated the judgment, and remanded the case for reconsideration in light of the 1997 Act. *See American Bible Society v. Richie*, 118 S. Ct. 596 (1997), [hereinafter, "*American Bible Society I*"].

In June 1998, the Fifth Circuit issued a new decision. This time, the court properly "reverse[d] the order denying [Petitioners'] motions to dismiss" Richie's antitrust claim. PA 6. Remarkably, however, the court "reinstate[d] the sanctions" this Court vacated six months earlier. *Id.* at 3.

In "reimpos[ing] the sanctions," the Fifth Circuit relied on the reasoning of its prior, vacated opinion. *See id.* at 6-7. The court stated simply that it "d[id] not agree" that, "under *United States v. Schooner Peggy*, 1 Cranch 103, 109 (1801), [it was] obliged to 'decide according to existing law' the issue of the frivolousness of [this] appeal." *Id.* The court also rejected as "unpersuasive" Petitioners' contention that *McKnight v. General Motors Corporation*, 511 U.S. 659 (1994) (per curiam), bars sanctions in cases of first impression. *Id.* at 7.

Believing that the order reimposing sanctions conflicts not only with *Schooner Peggy*, *American Bible Society I*, and *McKnight*, but also with three decisions of the Fifth Circuit, Petitioners timely suggested rehearing *en banc* to resolve the intracircuit conflict and maintain uniformity of decisions in the Fifth Circuit. After requesting and receiving an

answer from Richie, the Fifth Circuit denied rehearing on September 15, 1998. *Id.* at 43-45.

Remarkably, the order denying rehearing revealed that only one member of the argument panel still supports the sanctions award. According to the order, "Judge Reavley would not have imposed sanctions but deferred to the judgment of the other judges," and Judge Garza "dissent[ed] from [the] denial of rehearing," citing *American Bible Society I.* *Id.* at 45. Thus, it now appears that only Judge Smith, the presiding judge, believes that it was appropriate to reimpose sanctions against prevailing appellants in this case of first impression.

REASONS TO GRANT THE WRIT

Three reasons warrant review of the Fifth Circuit's unprecedented order sanctioning prevailing appellants for bringing this meritorious and successful appeal presenting important issues of first impression. First, the Fifth Circuit's conclusion that FED. R. APP. P. 38 authorizes sanctions in cases of first impression conflicts directly with *McKnight v. General Motors Corporation*, 511 U.S. 659 (1994) (per curiam), and with several decisions of the United States Courts of Appeals, including three decisions of the Fifth Circuit. Second, the Fifth Circuit's decision to judge the alleged frivolity of this appeal by reference to the 1995 Act rather than the 1997 Act conflicts with this Court's decision in *United States v. Schooner Peggy*, 1 Cranch 103, 2 L. Ed. 49 (1801), which requires federal courts to decide cases according to existing laws, and with the Court's decision in *American Bible Society v. Richie*, 118 S. Ct. 596 (1997) (per curiam), which directed the Fifth Circuit to reconsider this case in light of the 1997 Act. Third, the Fifth Circuit's determination that this appeal was frivolous when filed because the 1995 Act "obvious[ly]" did "not reach conspiracies involving both exempt and non-exempt entities" is a gross abuse of discretion justifying an exercise of the Court's supervisory power.

1. **The Decision to Impose Sanctions in this Case of First Impression Conflicts with this Court's Decision in *McKnight v. General Motors* and with Twenty Years of Circuit Court Precedent.**

As filed in 1996, this appeal turned on three questions. The first was whether the district court erred in concluding that Petitioners bore the burden to plead and prove the applicability of the 1995 Act as an affirmative defense. The second was whether the district court erred in concluding that the 1995 Act did not protect rate-setting agreements involving so-called "non-exempt" entities. The third was whether the 1995 Act provided a complete immunity from suit, including a right not to participate in discovery or trial. If Petitioners were correct in asserting that each of these questions should be answered in the affirmative, then the order denying their motion to dismiss Richie's price-fixing claim was not only erroneous, but also appealable. *See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-47 (1993) (because Eleventh Amendment provides complete immunity from suit in federal court, including right not to participate in discovery or stand trial, order denying motion to dismiss on Eleventh Amendment grounds is immediately appealable); *Earles v. State Bd. of Certified Public Accountants of Louisiana*, 139 F.3d 1033, 1040 (5th Cir.) (because state-action exemption provides complete immunity from suit rather than mere defense to liability, order denying motion to dismiss antitrust claims on state-action grounds is immediately appealable), *cert. denied,* 119 S. Ct. 444 (1998).

Before the Fifth Circuit issued its original, vacated decision in this case, no appellate court had ever decided any of the three issues on which this appeal then turned. Accordingly, the Fifth Circuit's "reimposition" of sanctions based on its conclusion that this appeal was frivolous when filed conflicts with *McKnight v. General Motors Corporation*, 511 U.S. 659 (1994) (per curiam), and with several other decisions barring appellate sanctions in cases of first impression.

A. For Twenty Years, the Courts of Appeals Have Barred Sanctions in Cases of First Impression.

Twenty years ago, the District of Columbia Circuit erected a *per se* bar against appellate sanctions in cases of first impression, holding in *Asai v. Castillo*, 593 F.2d 1222 (D.C. Cir. 1978), that sanctions were improper where the D.C. Circuit "had not previously addressed" the issue presented. 593 F.2d at 1225. As the Seventh Circuit would later explain in *Overnite Transportation Company v. Chicago Industrial Tire Company*, 697 F.2d 789 (7th Cir. 1983), imposing sanctions in cases of first impression "would have a profound chilling effect upon litigants and . . . interfere with the presentation of meritorious legal questions . . . ." 697 F.2d at 795.

In the fifteen years following *Asai*, all of the courts that faced the question agreed with the D.C. Circuit that appeals are not sanctionable unless foreclosed by controlling circuit precedent. *See, e.g., Stebco Inc. v. United States*, 916 F.2d 556, 558 (9th Cir. 1990) ("Because the reviewability of a district court's decision regarding venue in a §7429 proceeding is a question of first impression in this circuit, the government's attempt to appeal is not sanctionable conduct."); *Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 863 F.2d 851, 854 n. 5 (11th Cir.) (refusing sanctions where "appeal present[ed] an issue of first impression" in Eleventh Circuit), *cert. denied*, 490 U.S. 1107 (1989); *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 749, 761 (1st Cir. 1988) (refusing sanctions where appeal presented "important issues of first impression" in First Circuit); *Hageman v. City Investing Co.*, 851 F.2d 69, 72 (2d Cir. 1988) ("Given the previously unresolved state of the law in this Circuit concerning the question of appellate jurisdiction in consolidated actions, it would be improper to award sanctions against a party whose appeal raise[d] this issue for the first time."); *Overnite Transportation*, 697 F.2d at 794 (appeal was not frivolous where issues "had never previously been litigated under the Interstate Commerce Act").

By the end of 1993, the Fifth Circuit had rejected at least three requests for sanctions on the ground that the allegedly frivolous appeals were not foreclosed by circuit precedent. *See Estiverne v. Sak's Fifth Avenue*, 9 F.3d 1171, 1174 (5th Cir. 1993) ("Because the issue regarding the FCRA was novel to this Court, we decline to impose sanctions on appeal."); *Ehm v. Amtrak Bd. of Directors*, 780 F.2d 516, 518 (5th Cir. 1986) ("reject[ing]" sanctions "demand as inappropriate," because "[t]he issue presented by [the] appeal, *i.e.*, the propriety of a dismissal for failure to post a costs bond, involve[d] a novel procedural issue on which there ha[d] been no prior Fifth Circuit decision"); *Adult Film Ass'n v. Thetford*, 776 F.2d 113, 115 (5th Cir. 1985) (denying appellee's request for sanctions because, "[a]lthough it [could] be argued that [the appellant] knew or should have known that the district court's denial of his motion for default judgment was not appealable as a final order, no published Fifth Circuit opinion so stated"); *see also Coghlan v. Starkey*, 852 F.2d 806, 811 n.8 (5th Cir. 1988) (per curiam) (observing in dictum that, "[o]f course, sanctions are inappropriate if the appeal presents an issue of first impression.").

B. In *McKnight*, this Court Raised the Bar Against Sanctions in Cases of First Impression.

In 1994, this Court raised the bar against appellate sanctions even higher, holding in *McKnight v. General Motors Corporation*, 511 U.S. 659 (1994) (per curiam), that an appeal is not sanctionable unless foreclosed by a decision of ***this*** Court. Specifically, the Court held in *McKnight* that the Seventh Circuit's award of $500 in appellate sanctions was "not proper" insofar as it was based on a conclusion that the appeal "was foreclosed by ***circuit*** precedent." 511 U.S. at 659 (emphasis added). The Court reasoned that, although the court of appeals had correctly denied relief on the merits pursuant to Seventh Circuit authority, imposing sanctions was improper because "[f]iling an appeal was the only way [the] petitioner could preserve the issue pending a possible

favorable decision by ***this*** Court." *Ibid.* (emphasis added). Thus, under *McKnight*, an appeal is not "frivolous" within the meaning of FED. R. APP. P. 38 unless it is foreclosed by a controlling decision of this Court.[2]

C. The Fifth Circuit's Departure From Binding Precedent Merits Review.

The Fifth Circuit's decision in June 1998 to "reimpose" sanctions based on its vacated conclusion in April 1997 that Petitioners' appeals were frivolous when filed in October 1996 clearly conflicts both with *McKnight* and with twenty years of precedent in the courts of appeals and plainly merits review.

Although the Fifth Circuit was correct to conclude that "[t]he specter of sanctions deters . . . the pursuit of untested claims that are worthless on their face[s]," PA 7, it is equally true that "the specter of sanctions" can deter the pursuit of claims that are worthwhile and, thus, "interfere with the presentation of meritorious legal questions," *Overnite Transportation*, 697 F.2d at 795. Further, imposing sanctions in a case of first impression can unduly expose the judicial temperament of the sanctioning court to criticism in the event that this Court -- or Congress -- later rejects the analysis underlying its finding of frivolity. Thus, the Fifth Circuit's decision to abandon the prudential bar against appellate sanctions in cases of first impression in favor of an arbitrary, I-know-it-when-I-see-it test for arguments deemed "worthless on their face[s]" raises important procedural issues meriting this Court's attention on writ of certiorari.

Moreover, even if a new rule allowing sanctions in cases of first impression were not sufficiently troubling to merit review, the Fifth Circuit's refusal to follow this Court's decision in *McKnight* would nonetheless justify the writ.

---

[2]Since the Court decided *McKnight*, the Sixth Circuit has joined the courts of appeals that have refused to impose appellate sanctions in cases of first impression. *See Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1213 (6th Cir. 1997) (refusing sanctions where "central issue was one of first impression").

"If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). In this case, however, the Fifth Circuit ignored Petitioners' repeated citation to this Court's directly applicable decision in *McKnight*, *see* PA 78, 79-80, and followed inapposite dictum from *United States v. Alexander*, 981 F.2d 250 (5th Cir. 1993), a pre-*McKnight* decision vacating Rule 11 sanctions as an abuse of discretion. *See id.* at 7. A failure to correct that detour "into terra incognita," *Hopwood v. Texas*, 84 F.3d 720, 722 (5th Cir. 1996) (Politz, C.J., dissenting from denial of rehearing *en banc*), could only encourage similar losses of direction in the future.

2. **The Decision to Judge the Alleged Frivolity of this Appeal by Reference to the 1995 Act Conflicts with this Court's Decisions in *United States v. Schooner Peggy* and *American Bible Society v. Richie*.**

Congress' authority to correct what it perceives to be a misinterpretation of a federal statute through retrospective legislation such as the Immunity Act is beyond question:

> Congress . . . has the power to amend a statute that it believes [the courts] have misconstrued. It may even, within broad constitutional bounds, make such a change retroactive and thereby undo what it perceives to be the undesirable past consequences of a misinterpretation of its work product.

Rivers v. Roadway Exp., Inc., 511 U.S. 298, 313 (1994).

Since 1801, when this Court decided the seminal case of *United States v. Schooner Peggy*, 1 Cranch 103, 2 L. Ed. 49 (1801), it has been equally clear that federal courts must honor Congress' constitutional instructions to apply new law to pending cases. *See* 1 Cranch at 109, 2 L.Ed. at 51 ("[I]f, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the

rule which governs, the law ***must*** be obeyed, or its obligation denied. If the law be constitutional, . . . no court . . . can contest its obligation. . . . In such a case the court ***must*** decide according to existing laws . . . .") (emphasis added). "When a new law makes clear that it is retroactive, an appellate court ***must*** apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995) (citing *Schooner Peggy*; emphasis added).

Under *Schooner Peggy* and its progeny, the courts are obliged to heed Congress' instructions that the 1997 "Act, and the amendments made by th[e] Act, shall apply with respect to ***all conduct*** occurring before, on, or after the date of the enactment of th[e] Act," including all conduct at issue in this case, "and shall apply in ***all . . . judicial actions*** pending on or commenced after th[at] date," including this action. Pub. L. No. 105-26, § 3, 111 Stat. 241, 242 (1997) (emphasis added).

In *American Bible Society I*, Richie sought to avoid the rule of *Schooner Peggy*, asserting that, "[e]ven if the Court were inclined to grant certiorari, vacate, and remand, it should not do so with respect to the award of sanctions" because "the award was justified for many reasons, and nothing in the [1997] Act changes the analysis to be applied in assessing appellate sanctions." Respondent's Brief in Opposition at 15, *American Bible Society v. Richie*, 118 S. Ct. 596 (1997).

By vacating the entirety of the Fifth Circuit's April 1997 judgment and directing the Fifth Circuit to reconsider this case in light of the 1997 Act, this Court's order in *American Bible Society I* followed the time-honored rule of *Schooner Peggy* and required the Fifth Circuit to decide this entire case, including the sanctions issue, in light of the 1997 Act.

On remand, the Fifth Circuit conceded that the 1997 Act controlled its disposition of the merits of this appeal. *See* PA at 5. The court also conceded that the 1997 Act gave it appellate jurisdiction where it had previously -- although, in

Petitioners' view, erroneously -- held that none existed. *See id.* at 6 & n.5. Without citing a shred of authority, however, the Fifth Circuit stated simply that it "d[id] not agree" that it was obliged to decide the sanctions issue according to existing law. *Id.* at 6-7.

The Fifth Circuit's conclusion that the Congress and this Court intended the 1997 Act to govern the question whether Petitioners' appeal is meritorious but not the question whether it is frivolous finds support neither in law nor in logic. Thus, by refusing to apply the 1997 Act to the sanctions issue and instead "reinstat[ing] the sanctions" based on its previously vacated analysis of the superseded 1995 Act, *see* PA 3, 6-7, the Fifth Circuit contravened both the general rule of *Schooner Peggy* and the specific mandate of *American Bible Society I*. Accordingly, the court's decision to judge the alleged frivolity of this appeal in light of the 1995 Act independently merits review on writ of certiorari.

3. The Determination that this Appeal Was Frivolous When Filed Is an Abuse of Discretion Justifying an Exercise of this Court's Supervisory Power.

As Petitioners have previously argued in this Court, as well as in the Court of Appeals, the plain language of the 1995 Act immunized Richie's alleged conspiracy among "exempt" and "non-exempt" entities by immunizing the only aspect of the purported conspiracy that could have produced price-fixing liability in the absence of the Act: the alleged agreement of two or more charities to use the same rates for issuing gift annuities. *See* Petition for Writ of Certiorari at 21-27, *American Bible Society v. Richie*, 118 S. Ct. 596 (1997); PA 48-65. But, even if the Fifth Circuit were correct in reaching its now moot conclusion that the 1995 Act "d[id] not reach conspiracies involving both exempt and non-exempt entities," PA 17, the court's determination that its reading of the 1995 Act was "obvious" and "not arguable" would nevertheless constitute an abuse of discretion warranting an exercise of this Court's supervisory power.

Standing alone, the District Judge's concession that, "[a]fter reading more cases and further consideration of the arguments," even he was "not so sure of [Richie's] position" concerning "hybrid" conspiracies, PA 75, should have precluded the Fifth Circuit's determination that its interpretation of the 1995 Act was "obvious" and "not arguable." Importantly, however, the District Judge's letter "welcom[ing] an advisory opinion" on the "hybrid" conspiracy issue did not stand alone. The Fifth Circuit's determination of frivolity was further belied by: (a) the unrebutted textual argument that the 1995 Act immunized the alleged "hybrid" conspiracy by immunizing its only putatively unlawful aspect: the agreement of two or more charities to use the same annuity rates, (b) the statement in the 1995 House Report that Congress intended the 1995 Act "to extend to attorneys, accountants, actuaries, consultants, and others," (c) the confirmation of the congressional *amici* that Congress intended the 1995 Act to protect "any 'use'" of Council rates by charities, and (d) the statement in the 1997 House Report that the Fifth Circuit's April 1997 decision "indicate[d] that the Charitable Gift Annuity Antitrust Relief Act of 1995 [wa]s not being interpreted as broadly as it was intended by Congress," and (e) the November 8, 1996, decision of the Fifth Circuit motions judge that the appeal was sufficiently meritorious and urgent to be expedited on the court's docket. In light of this support for Petitioners' contentions, which the Fifth Circuit wholly ignored, the determination that this appeal was frivolous when filed is a gross abuse of discretion calling for an exercise of the Court's supervisory power.

CONCLUSION

For the reasons stated above, Petitioners respectfully request a writ of certiorari to review the June 12, 1998, order of the United States Court of Appeals for the Fifth Circuit sanctioning Petitioners under FED. R. APP. P. 38. In the event that the Court deems argument to be unnecessary, the Court should grant the writ and summarily reverse the

sanctions in accordance with *McKnight v. General Motors Corporation*, 511 U.S. 659 (1994) (per curiam).

December 14, 1998

Respectfully submitted,

Russell Yager
Counsel of Record
Robert C. Walters
VINSON & ELKINS L.L.P.
3700 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 220-7820
Attorneys for The American Bible Society, The Moody Bible Institute of Chicago, and American Leprosy Missions, Inc.

Thomas R. Jackson
Patricia Villareal
Chrysta L. Castaneda
JONES DAY REAVIS & POGUE
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 220-3939
Attorneys for Hay/Huggins Company, Inc.

George W. Bramblett, Jr.
Noel M. B. Hensley
Michelle McCoy Monger
HAYNES & BOONE, L.L.P.
901 Main Street, Suite 3100
Dallas, Texas 75202-3789
(214) 651-5000
Attorneys for Baptist Foundation of Texas

George C. Chapman
Gregory S. C. Huffman
William M. Katz, Jr.
THOMPSON & KNIGHT, P.C.
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201
(214) 969-1700
Attorneys for The Lutheran Church-Missouri Synod, Planned Giving Resources, Prerau & Teitell, Planned Giving Services, Inc., and The American Council on Gift Annuities, Inc.

Susan Abbott Schwartz
James D. Nations
HENSLEE, FOWLER, HEPWORTH & SCHWARTZ, P.L.L.C.
4131 N. Central Expressway
Suite 680
Dallas, Texas 75204-2117
(214) 219-8833
Attorneys for General Conference Corporation of Seventh-Day Adventists and Loma Linda University

Richard T. McCarroll
Walter H. Mizell
BROWN MCCARROLL & OAKS HARTLINE, L.L.P.
111 Congress Avenue, Suite 1400
Austin, Texas 78701-4043
(512) 472-5456
Attorneys for Texas District, Lutheran Church-Missouri Synod and Lutheran Foundation of Texas

Thomas D. Graber
LANGLEY & BRANCH, P.C.
717 N. Harwood, Suite 1700
Dallas, Texas 75201
(214) 953-7200
Attorneys for American Baptist Foundation, American Baptist Foreign Mission Society, and Evangelical Lutheran Church in America

Charles M. Barnard
807 Eighth Street, Suite 1006
City National Building
Wichita Falls, Texas 76301
(940) 761-3888
Attorney for University of Colorado Foundation, Inc.